In The

Supreme Court of the United States

October Term, 1977

No. 77-1020

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ, et al.,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF THEIR PENDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to Rule 24(5), Rules of the Supreme Court of the United States, Petitioners submit herewith their supplemental brief for the purpose of calling the Court's attention to a new case not available at the time of last filing, namely, the opinion of the United States Court of Appeals for the Third Circuit, rendered March 9, 1978,

in the cause entitled *Geraghty, et al. v. United States Parole Commission, et al.*, Docket No. 77-1679 (consolidated with Docket No. 77-1858).

The Petition for Certiorari was filed in this case on January 17, 1978, and has not been acted upon. A reply brief was filed by these Petitioners on or about February 24, 1978.

Appended hereto is the full text of Section B-3 of the Third Circuit's opinion in the *Geraghty* case (pp. 18-24 of the slip opinion), that being the portion of the opinion most relevant to the case at bar. (The full opinion is 62 pages in length, plus a four page appendix.)

Petitioners respectfully suggest that the position taken by the Third Circuit in *Geraghty* is fully in accord with that advocated by Petitioners in the Petition for Certiorari, is strongly persuasive on the merits of that position, and is squarely in conflict with the position adopted by the Seventh Circuit in the instant case.

This Court's attention is directed particularly to footnote 49 (A. 4a) wherein the Third Circuit acknowledges the existence of a conflict among the circuits, as asserted in the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

3. *The Impact of Denial of Class Certification*

In this case the trial court refused class certification. The question, then, is whether such refusal combined with Geraghty's release prevents our review of this matter, on the ground that we have before us neither a "live" plaintiff nor a properly certified class.

The Parole Commission earnestly contends that under *Board of School Commissioners of Indianapolis v. Jacobs*,[42] in the absence of a properly certified class the mooting of a named plaintiff automatically removes the suit from the category of a justiciable case or controversy. Reading *Jacobs* in this fashion, however, is incompatible with the Supreme Court's holdings in both prior and subsequent cases.[43]

In *Gerstein v. Pugh*,[44] the short duration of challenged pretrial custody precluded a class from being certified before the named plaintiffs were released. Nevertheless, the district court certified a class of pretrial detainees, and entertained the action. Noting that the challenged procedures would continue to apply to a succession of pretrial detainees, the Supreme Court held that the class

[42] 420 U.S. 128 (1975).

[43] The statements in *Sosna*, *Franks*, *Gerstein*, and *East Texas* that justiciability remains "given a properly certified class" may simply point to *certifiability*, not actual certification, as the crucial question. *See Satterwhite v. City of Greenville*, 557 F.2d 414, 417-421 (5th Cir. 1977) *rehearing en banc granted; Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975) (Friendly, J.) (*Sosna's* insistence on continuing existence of individual claim until certification is "drained" by "relation back" doctrine). Similarly, *Weinstein v. Bradford*, 423 U.S. 127 (1975), which dismissed a parole challenge as moot, is inapposite here since the *Weinstein* plaintiffs did not appeal the denial of class certification. *Cf. Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976) (individual action, no attempt to certify class).

[44] 420 U.S. 103 (1975).

certification preserved justiciability even though the certification might have been entered after the named plaintiffs lost a "live" interest in the suit.[45]

The Supreme Court in *Baxter v. Palmigiano*[46] adjudicated a controversy concerning prison regulations, although the case had not been properly certified as a class action and the named plaintiffs had died or had been released prior to the oral argument on appeal. The Supreme Court held that the subsequent intervention of another prisoner brought a justiciable case before the Court. This was so despite the fact that it was not clear that when the intervention had occurred, the district court still had a "live" individual plaintiff before it.

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[45] The stated rationale, that the later certification "related back" to the time that the plaintiffs had claims is at best a legal fiction. *See Gardner v. Westinghouse*, (Seitz, J. concurring) No. 76-1410 (3d Cir. 1977) slip op. at 18-19, *cert. granted* ..... U.S. .....; *Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975).

The *Gerstein* decision had been presaged by *Kelly v. Wyman*, 294 F. Supp. 887, 890 (S.D.N.Y. 1968) *aff'd sub nom Goldberg v. Kelly*, 397 U.S. 254, 256 n. 2 (1970). There the district court refused to dismiss a challenge to welfare regulations before class certification despite an allegation that most if not all of the named plaintiffs had been reinstated to welfare, on the ground that "plaintiffs claim to represent a class." The Supreme Court affirmed the class relief, noting that some of the then-named plaintiffs were still embroiled in disputes with the welfare department. It was not clear, however, whether those plaintiffs had been named at the time of the original decision or had subsequently intervened. *See Goosby v. Osser*, 409 U.S. 512 (1973) (adjudicating class action of prisoners confined to pretrial detention, despite the fact that apparently there was no indication whether they had been released prior to class certification); *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973) (*en banc*) (allowing class action on behalf of juvenile detainees, despite the fact that named detainees had been released after short time).

Since *Gerstein* a number of courts have allowed certification on a "relating back" theory. *E.g. Williams v. Wohlgemuth*, 540 F.2d 163 (3d Cir. 1976); *Basel v. Knebel*, 551 F.2d 395, 397 (D.C. Cir. 1977); *Zurak v. Regan*, 550 F.2d 86 *cert. denied* ..... U.S. ..... (2d Cir. 1977).

[46] 425 U.S. 308, 311 n. 1 (1976).

Most recently, in *United Airlines v. McDonald*,[47] the Supreme Court reviewed a refusal to allow putative class members in an employment discrimination suit to intervene in order to appeal a denial of class certification. By the time the motion for intervention was presented, the original named plaintiffs had already been awarded relief and as to them the case was moot. Again, intervention was permitted at a time when the named plaintiffs no longer retained "live" claims.

In light of *Gerstein*, handed down on the same day as *Jacobs*, and of *Baxter* and *McDonald*, both decided after *Jacobs*, the *Jacobs* case should not be viewed as standing for the proposition that the federal courts are constitutionally barred from continuing to adjudicate disputes when the named plaintiff no longer retains his claim. So long as a factually concrete legal controversy continues to exist, it would appear that the constitutional *power* of a court over the case remains. Consequently, the holding of *Jacobs* is perhaps best understood as a specific instance that must be seen in the context of the over-arching set of principles adumbrated by the authorities cited above.

In *Jacobs*, the Supreme Court reviewed a First Amendment challenge by a group of students to regulations limiting publication of a newspaper. Since the students had graduated, and the periodical in question had ceased publication, the inability to delimit accurately the plaintiff class deprived the Court of the assurance of justiciability. In addition, the failure of counsel to seek a proper class certification cast serious doubt on the continued adequacy of the adversarial clash.[48]

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[47] 45 U.S. L.W. 4760 (1977). *Cf. Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir. 1975) (allowing substitute plaintiff to intervene for named plaintiff who never had standing, but allowing filing of original class action to toll statute of limitations).

[48] As other courts have noted, the failure to certify the class in *Jacobs* was not assigned as error. *Napier v. Gertrude*, 542 F.2d 825, 827 (10th Cir. 1976) *cert. denied* ..... U.S. ..... (1977); *Gardner v. Westinghouse*, No. 76-1410 (3d Cir. 1977) slip op. at 18 n. 5 (Seitz, J. concurring) *cert. granted* ..... U.S. ..... .

An appropriately defined and certified class assures the courts that the case involves a concrete legal controversy, proper factual predicate, and functional adversity. The lack of certification, however, does not inevitably require dismissal, if the elements of justiciability are otherwise established.[49] Thus, in *Gerstein*, *Baxter*, and *McDonald* no doubt could validly have been raised concerning the continuation of the underlying legal controversies. Counsel in *Gerstein* and *McDonald*, could not have been charged with responsibility for the failure of certification, and in both *Baxter* and *McDonald* the continuation of the adversarial difference was assured by the intervention of live plaintiffs. In those situations, a concrete dispute continued and representation was adequate. Consequently, the cases were not dismissed.

In the matter before us, there is neither a contention by the government nor evidence in the record which raises any question but that a legal controversy exists. The fate of numerous federal prisoners continues to turn in large part on the application of the guidelines in

[49] We acknowledge that the courts of appeals are divided on the question of whether under the recent Supreme Court decisions, the denial of class action status is appealable by a named plaintiff whose claim has become moot. *Banks v. Multi Family Management*, 554 F.2d 127 (4th Cir. 1977) (Refusal to certify since development of mootness was not "inherent in the nature of the claims," and the named defendant had already agreed to relief sought); *Satterwhite v. City of Greenville*, 557 F.2d 414 (5th Cir. 1977) *rehearing granted en banc* (refusal to certify class is appealable if improper if at the time that the class should have been certified, and the named plaintiff still had a live claim at that time); *Kuahula v. Employers Insurance of Wausau*, 557 F.2d 1334 (9th Cir. 1977) (survival of action is governed by "idiosyncrasies of each case;" action in question did not survive, but the Court suggests a number of situations in which it might); *Winokur v. Bell Federal Savings and Loan*, 560 F.2d 371 (7th Cir. 1977) (damages claimed were tendered to individuals, no plausible claim of repetition, no review allowed of failure to certify class. Dictum that issue of class certification cannot survive mooting of individual claims; *Napier v. Gertrude*, 542 F.2d 825 (10th Cir. 1976) (review available where failure to certify is "correctable on appeal," correctability is a function of particular situations, mainly available in situations otherwise evading review).

question. Such a situation in our view satisfies the "case or controversy" components of the mootness doctrine. Further, under the circumstances of this case, the more discretionary elements of the restrictions against entertaining moot cases do not mandate dismissal. Four aspects of the case lead to this conclusion.

First, Geraghty's action, while not wholly congruent, shares many characteristics with the cases denominated "capable of repetition, yet evading review." This is so since federal prisoners are eligible for parole if their sentences exceed one year.[50] Accordingly, while some prisoners will retain their grievances long enough to achieve appellate review, a number of prisoners with short sentences, like Geraghty, will inevitably be discharged before they have an opportunity to litigate fully the legality of the rules which deny them parole. This alone is a factor weighing heavily in favor of justiciability.[51] And since it is the prisoners with unusually short sentences to whom the parole guidelines deny the benefit of the trial judge's leniency,[52] the limited probability of review for a prisoner with a short sentence is particularly pertinent.

Second, as we have noted, this case involves denial of a class action certification. As Chief Judge Seitz observed in *Gardner v. Westinghouse*,[53] if mooting of a named plaintiff's claim bars review of a denial of class cer-

[50] 18 U.S.C. § 4205 (1976).

[51] *See Zurak v. Regan*, 550 F.2d 86 (2d Cir. 1977) (prisoners whose complaints on parole procedure would often—but not always—evade review were allowed to "relate back" certification to a time before the named plaintiff's release). *Cf. United States v. Frumento*, 552 F.2d 334 (3d Cir. 1977) (*en banc*) (compulsion to testify before grand jury).

[52] The government's brief in this action (p. 12) suggests that only prisoners with short sentences have an interest in attacking the guidelines' failure to take account of sentence length.

[53] Slip op. No. 76-1410 (3d Cir. 1977) (Seitz, C.J. concurring) *cert. granted* ..... U.S. ..... .

tification, our rule against interlocutory appeals of class certification orders will, in a significant number of cases, effectively immunize from review such adverse class determinations. This is hardly a salutary result for, although class certification had been improperly denied, a constitutionally justiciable controversy nevertheless continues to exist.

Third, the attorneys for Geraghty, while not possessed of a legally continuing relationship with members of the plaintiff class,[54] have nonetheless undertaken this litigation on a class-oriented basis. There is no indication of any diminution of vigor in their efforts despite the release of Geraghty. Indeed, as already observed, they represent another individual plaintiff who now seeks to intervene in the matter. Consequently, there is a *prima facie* case of functional adversity, a central element which the mootness doctrine seeks to preserve.

Finally, the major issues in the case in no way appear to be tied to the nuances of individual fact patterns. The discharge of Geraghty does not alter either the interests of the members of the putative class[55] or the practice of the Parole Commission in applying its guidelines.[56]

Hence, if class certification is appropriate in this case, the mootness of Geraghty's claim should not bar adjudication.

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[54] *Cf. Gerstein v. Pugh*, 420 U.S. 103, 110, 111 n. 11 (1975) (public defender had continuous relationship with class of pretrial detainees).

[55] *Cf. Kremens v. Bartley*, 431 U.S. 119 (1977).

[56] *See* Note, *Mootness Doctrine*, *supra* note 22 at 394. *Cf. De Funis v. Odegard*, 416 U.S. 312 (1975).